No. 84-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC.,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

On Appeal From The Supreme Court of Florida

REPLY BRIEF FOR APPELLANT

WALTER D. HANSEN
BURWELL, HANSEN, MANLEY & PETERS
1762 Church Street, N.W.
Washington, D.C. 20036
(202) 745-0441

Attorney for Appellant

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-902

WARDAIR CANADA INC.,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

On Appeal From The Supreme Court of Florida

REPLY BRIEF FOR APPELLANT

STATEMENT

This brief is in reply to the briefs on the merits of Appellee (Florida), and the Amici Curiae Brief in support of Florida on behalf of the National Governors' Association, the International City Management Association, the National Conference of State Legislatures, the National League of Cities, the Council of State Governments, the U.S. Conference of Mayors, and the National Association of Counties (Local Taxing Amici).[1] The motion of Local

[1] On February 24, 1986, the Court granted Local Taxing Amici's motion to file a brief as Amici Curiae.

Taxing Amici for leave to file a brief forcefully demonstrates what will be the effect of a holding affirming the Florida Supreme Court decision. A proliferation of taxing legislation by states, counties, and/or cities throughout the United States can be expected, taxing, as has Florida, the jet fuel used exclusively in international air transportation by foreign nationals. The result will be to debilitate seriously the effectiveness of the Federal Government to achieve the statutory foreign air transportation policies, enacted by Congress and contained in section 1102(b) of the Federal Aviation Act of 1958, 49 U.S.C. sec. 1502(a), through appropriate international regulatory agreements with relevant foreign nations negotiated and executed by the Department of State pursuant to section 802 of the Act, 49 U.S.C. sec. 1462, on behalf of the United States. The State Department in a letter to Florida's Department of Revenue anticipated the effect of Florida's tax on the aviation fuel of foreign airlines: "A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions." S.J.A. at A-83. The Court foresaw the same problem in *Japan Line,* 441 U.S. at 453:

> "If other States follow California's example . . . [the] result, obviously, would make 'speaking with one voice' impossible."

The Court forbade such an erosion of the Federal Government's power in foreign commerce by declaring such action unconstitutional. *Japan Line* v. *County of Los Angeles,* 441 U.S. 434 (1979).

ARGUMENT

I. Florida and Local Taxing Amici Would Have This Court Apply Interstate Commerce Standards To An Exclusively Foreign Commerce Issue Involving International Regulation By The United States And Its Foreign Nation Partners; A Field Which This Court Has Held Repeatedly Is In The Sole Domain Of The Federal Government.

What Florida and Local Taxing Amici refuse to recognize is the broad inherent, "exclusive and absolute" Federal power to negotiate international agreements with foreign nations regulating foreign commerce without interference by the individual states and other local governments. *Buttfield* v. *Stranahan,* 192 U.S. 470, 492–493 (1904). In the field of international air transportation, Congress devised a highly structured regulatory system through the Federal Aviation Act of 1958, as amended, and has set out in that Act the international goals to be achieved by the Federal Government. 49 U.S.C. sec. 1502(b). Through it Congress delegated to the State Department the powers essential to negotiate and execute international agreements with foreign nations in order to achieve its statutory goals. 49 U.S.C. sec. 1462. Any foreign air transportation service rights for U.S. and foreign carriers can be achieved only through such international agreements spelling out the terms and conditions of service, or by consensus reached between the governments based on reciprocity and comity. In any regulatory negotiations with foreign nations, diplomacy and tact are mandatory if Congress' international air transport competition goals for U.S. carriers (49 U.S.C. sec. 1502(b)) are to be realized since many foreign nations own all or have

part interests in the airlines those nations will designate for service[2] once the regulatory agreement is achieved.[3]

Florida and Local Taxing Amici also ignore the continual and perpetual international negotiating process which the Federal Government is required to carry out in order to improve and upgrade air service opportunities for U.S. carriers in the foreign air transportation field. See, U.S. Br.I at 20; U.S. Br.II at 9-10. If foreign governments perceive an inability of the United States to fulfill its international commitments, then the statutory international goals of Congress may be seriously impaired or thwarted. Retaliation may result affecting the Nation as a whole if the U.S. breaches its obligations, but such retaliation may not be in kind. As the United States noted (U.S. Br.II at 10):

> "In the past, United States carriers have encountered a variety of discriminatory measures abroad, including the levy of artificially-inflated 'user fees,' the imposition of obstacles to repatriation of foreign earnings, the routing of airlines to less desirable airports, the refusal to let carriers use baggage handlers of choice, the award to local airlines of preference in carrying air cargo, the imposition of restrictions on United States airlines' local advertising, and the infliction of excessively complicated customs procedures and bureaucratic red tape. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977)."

---

[2] Canada has no equity interest in Appellant, its parent company,or any of its subsidiary or affiliate corporations.

[3] U.S. Br.I at 2-3. The United States has filed two briefs in support of Appellant. Its first brief supported Appellant's Jurisdictional Statement and is referred to throughout this brief as U.S. Br.I. Its subsequent brief on the merits supporting Appellant's position that the Florida Supreme Court decision should be reversed is referred to as U.S. Br.II.

One of Congress' principal international aviation goals is the elimination of just such discriminations by foreign nations. Section 1102(b)(9) of the Act, 49 U.S.C. sec. 1502(b)(9).

U.S. carrier participation in foreign air transportation is totally dependent on the ability of the Federal Government to operate effectively in foreign affairs unencumbered by the provincial interests of this Nation's political subdivisions. If the positions of Florida and Local Taxing Amici are upheld, the well being of this Nation's international air transportation system will be put in serious jeopardy. *Japan Line* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979). In spite of the adverse risks to this Nation's foreign air transport system if they prevail, Florida and Local Taxing Amici would have this court adopt strictly interstate commerce standards to resolve the strictly foreign commerce issue in this case. The precedents cited by them for their positions are cases resolving domestic rather than international issues. For example: *Hillsborough County* v. *Automated Medical Labortories*, 105 S.Ct. 2371 (1985), and *Silkwood* v. *Kerr-McGee Corp*, 464 U.S. 238 (1984). In the *Hillsborough* case the question was whether federal regulations setting minimum standards as to the collection of blood plasma preempted a local ordinance which prevented individuals with hepatitis from donating their blood. This Court upheld the local ordinance. In so doing the Court observed that "the regulation of health and safety matters [within local borders] is primarily, and historically, a matter of local concern. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S., at 230, 67 S.Ct., at 1152." *Hillsborough*, 105 S.Ct. at 2378. Similarly, the *Silkwood* case did *not* involve the foreign commerce clause. The issue in that case was a local one, involving damages authorized under Oklahoma law as to the conduct of the Appellee involving radiation hazards.

The point that Florida and Local Taxing Amici have overlooked, whether intentionally or not, is the differences

in the considerations when the issue involves interstate commerce rather than foreign commerce. Those differences were noted by the Court in *Japan Line* v. *County of Los Angeles*, 441 U.S. 434, 449 (note 13) (1979): "Congress' power to regulate *interstate* commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate *foreign* commerce could be so limited." Emphasis added. As to relations with foreign governments affecting foreign commerce the powers of the Federal Government are and must be exclusive and plenary. Those Federal powers cannot be interfered with in any way through any form of state action.[4] See Appellant's Br. at 40-43. This point was stressed by the Court in *Japan Line*, 441 U.S. at 448:

> "Foreign commerce is pre-eminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' *Board of Trustees* v. *United States*, 289 U.S. 48, 59 (1933)."

In *Board of Trustees* v. *United States*, 289 U.S. at 56-57 (1933), the Court stressed that the Federal Government's power over foreign commerce "may *not* be limited, qualified, or impeded to any extent by state action." Emphasis

---

[4] Florida erroneously advocates that the standards of *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), be applied in this case noting (Florida's Br. at 25) that those standards are "to determine the supremacy of a federal regulatory scheme over the state regulation in the same or similar area." But that case pertained to a question of shared powers (i.e., federalism) between the state and Federal Government requiring an inquiry as to whether the Federal Government had preempted the field. Such an inquiry is *not* applicable here since this case deals exclusively with the U.S. foreign commerce relationships with foreign nations, an area in which the individual states and their political subdivisions have *no* power. *United States* v. *Belmont*, 301 U.S. 324, 330 (1937).

added. In *Buttfield* v. *Stranahan*, 192 U.S. 470, 492 (1904), the Court held that Congress has the "plenary power" to regulate foreign commerce. And in *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941), the Court emphasized that the national interest "imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."[5]

Container Corp. of America v. *Franchise Tax Board*, 463 U.S. 159 (1983), does *not* advance the position taken by Local Taxing Amici, although frequently cited by it.[6] Basically, *Container* is *not* a foreign commerce clause case. A domestic issue was the principal focus of that case having "merely . . . foreign resonances." 463 U.S. at 194. As a result, since *Container* involved an issue *domestic* in nature, the U.S. system of federalism required a balancing of federal and state powers. *See e.g., Japan line*, 441 U.S. at 448 (note 13); *Hines* v. *Davidowitz*, 312 U.S. at 63; *United States* v. *Belmont*, 301 U.S. 324, 330 (1937). It was that balancing process which the Court used in *Container* to reach its majority decision. The subject tax in *Container* was "on a domestic corporation," "not on a foreign entity as was the case in *Japan Line*," (463 U.S. at 195), or as is the case here.[7]

In *Container* the appellant did *not* challenge the state's right to tax appellant's income; it was the state's formula for such taxation which the *Container* appellant challenged.

---

[5] See, Alexander Hamilton in Federalist Paper No. 80: "The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."

[6] Wisely, Florida does not suggest that *Container Corp. of America* in any way supports its position.

[7] The Court in *Container* noted that its opinion did not address "the constitutionality . . . with respect to state taxation of domestic corporations with foreign parents or foreign subsidiaries." 463 U.S. at 189 (note 26).

463 U.S. at 184. In this case the tax itself is challenged. The tax in *Container* was on the income of a domestic entity. In *Japan Line,* just as in this case, the tax was on the instrumentality of foreign commerce used exclusively in such commerce and owned by a foreign national. 463 U.S. at 185. While in *Container,* the Court ruled that it would be unfair to preclude the state from taxing appellant's income, it also noted the *Japan Line prohibition* of a state taxing an instrumentality of foreign commerce used in such commerce by a foreign national does "no more than reflect consistent international practice and express federal policy." 463 U.S. at 190. Finally, while a majority of the court construed the *Container* issue to be primarily domestic, three Justices demonstrated in a dissenting opinion that they would follow *Japan Line,* and would declare the state's tax unconstitutional.

II. Florida And Local Taxing Amici Would Have The Court Retreat From The *Japan Line* Decision, Urging That In The Foreign Commerce Realm, The Substitution Of The Interstate Commerce Standards of *Complete Auto* For Foreign Commerce Standards Of *Japan Line;* Local Taxing Amici Terming the "One Voice" Doctrine As A "Notion," The Instrumentality Of Foreign Commerce Question To Be Of "No Significance."

Florida and Local Taxing Amici view the *Japan Line* decision from substantially different perspectives. Florida candidly perceives the *Japan Line* "one voice" doctrine to be of substantial significance. But Florida concludes that its fuel tax does not violate that doctrine since the "Federal Government has spoken, saying that all airlines should be treated equally in every respect." Florida's Br. at 28. Florida goes on to say (p. 28) that its fuel tax does treat domestic and foreign airlines equally. It taxes them both. This view of the meaning of the *Japan Line* "one voice" standard misses the mark by a substantial margin. In *Japan Line,* California engaged in no discrimination. Both

domestic and foreign transport carriers were taxed by it. The Court, however, rightly concluded that the tax of California on instrumentalities of commerce that are owned and exclusively used in international commerce by foreign nationals violates the foreign commerce clause of the U.S. Constitution. The *Japan Line* decision requires the same result in this case. See Appellant's Br. at 21-34.

Local Taxing Amici takes a radically different approach. It attempts to obscure the total dependence of the U.S. foreign air transport system upon the ability of the Federal Government to achieve commercial relationships with foreign governments. It disregards how necessary it is for those foreign governments to be confident that the U.S. can and will live up to its commitments. Local Taxing Amici labels the *Japan Line* "one voice" standard as a "notion" (Local Taxing Amici Br. at 21), the instrumentality of foreign commerce question in *Japan Line* of "no significance" (Local Taxing Amici Br. at 19 (Note 12)), and finally that the Florida fuel tax does *not* "conflict in any way" (Local Taxing Amici Br. at 14) with the Chicago Convention and the other international agreements relating to the taxing of aviation fuel used in international air transportation to which United States is a party. Local Taxing Amici Br. at 14-16. In essence, the position of Local Taxing Amici is that as to foreign commerce issues where regulations by the United States in partnership with foreign governments are required, that the interstate commerce standards of *Complete Auto Transit* v. *Brady,* 430 U.S. 274 (1977), should apply, *not* the foreign commerce standards of *Japan Line.* Local Taxing Amici Br. at 24.

Rather than being just a "notion," the "one voice" standard of *Japan Line* was the crux of that decision. On the basis of the application of the "one voice" standard, the Court in *Japan Line* held that when a state tax violated the "one voice" standard "it is unconstitutional under the Commerce Clause." *Japan Line,* 441 U.S. at 451. It is the "one voice" standard of *Japan Line* which ensures

that the Federal Government's power in foreign commerce remains uninfringed.

The "one voice" standard was applied in *Japan Line* to the issue: "whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to . . . taxation by a State." 441 U.S. at 444. In so doing the Court declared that "When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, *beyond those articulated in Complete Auto,* come in to play. The first is the enhanced risk of multiple taxation." Emphasis added. *Japan Line,* 441 U.S. at 446. The second is that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." *Japan Line,* 441 U.S. at 448. This second consideration is the "one voice" standard. 441 U.S. at 451. If either the first or the second concept is contravened by a state tax, the Court held, that tax is unconstitutional. 441 U.S. at 451. The Court in *Japan Line* concluded that California's tax on an instrumentality of foreign commerce owned by a foreign national and used exclusively in international commerce violated the "one voice" standard and was therefore unconstitutional. 441 U.S. at 454.

Instead of being of "no significance," the determination of whether the state tax was on an "instrument of foreign commerce" was basic to the "one voice" determination of *Japan Line.* The Court notes in *Container Corporation of America* v. *Franchise Tax Board,* 463 U.S. 159, 188 (1983), the importance of the "instrument of foreign commerce" factor in *Japan Line* and because of the absence of that factor in *Container, Japan Line* was not followed:

> "The . . . difference between this case and *Japan Line* is that the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States."

That distinction between the circumstances in *Container* and *Japan Line* set forth in *Container* is as applicable to the circumstances of this case. Here, the circumstances are virtually identical to those in *Japan Line. Container* is just *not* an applicable precedent in this case.

Local Taxing Amici attempts to minimize (p. 14) the importance of the Chicago Convention stating that the Florida fuel tax does *not* "conflict" with that convention. However, the Chicago Convention in this case is as decisionally important to the issue here as the Customs Convention on Containers was in *Japan Line.*

In reaching its decision that the California tax violated the *Japan Line* "one voice" standard the Court in *Japan Line* determined that the cargo containers used by foreign nationals exclusively in international transportation are instrumentalities of commerce "as a matter of law" based on the provisions of the Customs Convention on Containers, 20 U.S.T. 301, 304 (1956), a multilateral agreement signed by the United States and other nations, providing that containers while used in international commerce and temporarily imported into the United States are admitted free from import and customs duties. The Container Convention did *not* address state and local taxes. A virtually identical situation exists as to the international air transportation field. The United States has entered into a multilateral convention, the Chicago Convention, 61 Stat. 1180, TIAS 1591 (eff. 1947), in which the United States along with 155 other countries including Canada have agreed through Article 24(a) (See Appellant's Br. at 3) that aviation fuel on board an aircraft engaged in international air transportation "shall be exempt from customs duty, inspection fees or similar national or local duties and charges." Appellant submits that on the basis of *Japan Line* and the analysis in that decision through which the

Court determined that the cargo containers were instrumentalities of foreign commerce, a similar analysis in this case based on Article 24(a) of the Chicago Convention mandates a conclusion that as a matter of law aviation fuel used to propel aircraft in foreign air transportation is an instrumentality of foreign commerce.[8]

The Court not only resolved the instrumentality of foreign commerce question in *Japan Line* through its analysis of the purposes of the Container Convention, but it also determined through that analysis the need for uniform regulatory treatment of the instrumentalities of foreign commerce, and that national policy exists to bar hindrances to the use of them. 441 U.S. at 453. The purposes of the Container Convention and the Chicago Convention cannot be differentiated. The Court's conclusions in *Japan* after its analysis of the Container Convention is as applicable to the treatment in the Chicago Convention of aviation fuel used in international services:

> "The desirability of uniform treatment of containers [aviation fuel in this case] used exclusively in foreign commerce is evidenced by the . . . Convention . . . .The Convention reflects a national policy to remove impediments to the use of containers [aviation fuel in this case] as 'instruments of international traffic.' " 441 U.S. at 452-453.

---

[8] Local Taxing Amici does not contest Appellant's conclusion that the jet fuel it uplifts at Florida for exclusively international air transportation is an instrumentality of foreign commerce. Local Taxing Amici Br. at 18 (note 12). Florida on the other hand does dispute this point taking the same position it did in its motion to dismiss. Florida's Br. at 5. Florida does not attempt to overcome the demonstration in Appellant's brief (pp. 21-22) which shows that by the term "instrumentality of foreign commerce" the Court has held that the term means the "means of commerce", and that the Court has held that fuel used for propelling a transport vehicle in commerce is an instrumentality of commerce.

Based on its analysis of the Containers Convention, the Court in *Japan Line* applied the "one voice" standard holding that the unilateral act of California taxing an instrumentality of foreign commerce of a foreign national used exclusively in international commerce interfered with federal national policy relating to international trade requiring uniform regulatory treatment and such state action was therefore unconstitutional. The Chicago Convention requires the same conclusion here: that Florida's taxing Appellant's aviation fuel used exclusively in international commerce is unconstitutional since it violates the Court's "one voice" doctrine.[9] Florida's tax conflicts with the national policy reflected in the Chicago Convention, and it is therefore unconstitutional.

III. Florida And Local Taxing Amici Do Not Deny That The Federal Government Has Exclusive Powers Over Foreign Air Transportation, But They Argue That Since The Tax Is Not Specifically Prohibited, Florida Can Enforce It; That Argument Is Contrary To The *Japan Line* Decision.

Florida essentially parrots the position of the Florida Supreme Court: there is no federal requirement specifically prohibiting Florida's fuel tax on Appellant's jet fuel used exclusively in foreign air transportation services and therefore the tax is constitutional. Florida's Br. at 18-24. Local Taxing Amici presents a comparable argument.

Local Taxing Amici concedes (p. 11) that "Congress has expressly delegated to the Executive the power to enter

---

[9] There are other evidences in this case reflecting a national policy requiring the uniform regulation by the Federal Government without any interferences by the states or their political subdivisions, such as the ICAO resolutions (Appellant's Br. at 23), the many international air transport bilateral agreements between the United States and foreign nations (Appellant's Br. at 27-29), the State Department's policy letters to the Florida Department of Revenue (J.S.A. at A-82, A-87), and the Federal Aviation Act of 1958, as amended. Appellant's Br. at 34-44.

into international agreements concerning air transportation. 49 U.S.C. [secs.] 1462, 1502." It also concedes (p. 9) "that Congress has taken an extensive role in the regulation of aviation." Finally, Local Taxing Amici concedes (p. 27 (note 17)) that the Florida fuel tax to which Appellant objects could be specifically preempted through international agreements negotiated and executed by the State Department in conformity with the powers delegated to it by Congress through the Federal Aviation Act. However, until the Federal Government does take specific preemptive action, Local Taxing Amici argues, the individual states can move into foreign commerce areas not so preempted. Such arguments by Florida and Local Taxing Amici are not new to the Court. The appellee in *Japan Line* presented the Court with the identical argument: in foreign commerce involving relations with foreign governments, the state may intrude in areas not specifically preempted by the Federal Government. The Court summarily rejected such an argument:

"We find no merit in this contention. The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it long has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce . . . . Appellees' argument, moreover, defeats, rather than supports, the cause it aims to promote. For to say that California has created a problem susceptible only of congressional—indeed, only of international—solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies." Quotation marks eliminated. *Japan Line,* 441 U.S. at 454-455.

That holding is as applicable here. Neither Florida nor the Local Taxing Amici may "tell this Nation . . . how to run [its] foreign policies."

IV. The Canada Situation Demonstrates How Imperative It Is For The Federal Government To Be Unencumbered By State Interference In This Nation's Foreign Commerce Relationships.

Most provinces of Canada impose a tax on aviation fuel uplifted from their storage facilities.[10] Only two exempt foreign airlines from the tax. Both Florida and the Local Taxing Amici seem to infer that this situation in some way supports their position. It does not. Rather, it dramatizes the need for the Federal Government to retain its exclusive power to resolve foreign relations problems unencumbered in any way by the unilateral actions of individual states. *Japan Line* 441 U.S. at 453. This point was succinctly stated by the United States in it brief supporting the position of Appellant (U.S. Br.II at 7-8):

> "The Canadian provincial taxes to which we have referred may cause international difficulties. Any problems they create, however, 'are problems that admit only of a federal remedy [and] do not admit of a unilateral solution by a State' (*Japan Line,* 441 U.S. at 457). If those taxes are said to breach reciprocity, it is the federal government, not the individual states, that must make the appropriate inquiry. And if those taxes are determined to breach reciprocity, it is the federal government, not the individual states, that is

[10] Services between the United States and Canada are regulated in the charter field by the U.S./Canada Nonscheduled Air Service Agreement (See J.S.A. at A-58), and scheduled service by the U.S./Canada Air Transport Services Agreement, 17 U.S.T. 201, 205 (Jan. 17, 1966). The latter U.S./Canada agreement contains in its Article XI a similar exemption from the taxing of aviation fuel used in international air transportation services as is contained in Article XII of the U.S./Canada Nonscheduled Air Services Agreement.

alone capable of taking the diplomatic steps (including the adoption of any appropriate sanctions) necessary to effect a resolution."

The Federal Government is presently attempting to reach a solution to the problem with Canada. U.S. Br.II at 6. The United States airlines "fully support a diplomatic initiative with Canada" U.S. Br.II at 6. One of the principal United States airlines performing scheduled services between the United States and Canada, American Airlines, is participating along with Aer Lingus and many other foreign carriers in an amici brief supporting the position of Appellant.[11] The Federal Government has the exclusive power to seek a solution on behalf of the United States, and Florida or any other U.S. state should not be granted through a decision in this case the opportunity to interfere. See, *Japan Line*, 441 U.S. at 453.

V. Section 1113 Of The Federal Aviation Act Does Not Grant To Individual States And Their Political Subdivisions Any Taxing Powers; Instead, It Preempts Some Of Their Taxing Powers.

Both Florida and Local Taxing Amici refer to section 1113(b) of Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1513(b), as if that provision has some relevance to the issue of this case. It does not. That provision does *not grant* the individual states and their political subdivisions *any* taxing powers. It merely evidences the limits to the preemption by the Federal Government through subsection 1113(a) of the states' taxing power. It does no more than that, and this Court so held.

The Court in its decision, *Aloha Airlines* v. *Director of Taxation of Hawaii*, 464 U.S. 7 (1983), concluded that in

[11] While many U.S. schedule airlines filed suits opposing the Florida fuel tax, including carriers like Eastern Airlines and Delta Air Line that perform substantial U.S.-Canada scheduled service (See Nos. 84-901, 84-926 and 84-929), *no* U.S. airlines apparently has filed any suit in any court in Canada opposing any of the provincial fuel taxes.

1970 Congress passed the Airport and Airway Development Act of 1970, 84 Stat. 219, and the Airport and Airway Revenue Act of 1970, 84 Stat. 236, so that the Federal Government could assist states and their political subdivisions in expanding and improving airport and airway systems. Subsequently, in 1973, Congress passed the Airport Development Acceleration Act of 1973, 87 Stat. 88, in order

> "to provide increased Federal participation in airport development grants [which] is required because of the the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly-owned airports." S. Rep. No. 93-12, 93d Cong., 1st sess. 4 (1973); see, H.R. Rep. No. 93-157, 93d Cong., 1st sess. 2-3 (1973).

The additional federal funding would come from federal taxes on passenger and freight air transportation services. *Aloha Airlines*, 464 U.S. at 9. Through section 7 of P.L. 93-44, a new section was added to the Federal Aviation act of 1958, section 1113[12]:

> "The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972

[12] The reason for including the preemption provision in the Federal Aviation Act was set forth in S. Rep. No. 93-12 at 25: "In view of the fact that the Federal Aviation Act of 1958 is the Act under which the Federal Government exercises its authority under the commerce clause of the Constitution to regulate air transportation, it is our opinion that an amendment to such Act would be the most appropriate method of exercising the authority to pre-empt State and local taxation of passengers engaged in air transportation in the interests of the needs and proper regulation of such transportation."

> Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al.* v. *Delta Airlines*, [405 U.S. 707 (1972)]. . . .
>
> ". . . The Court, in essence, ruled that states and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers in order to underwrite airport operational and development costs." S. Rep. No. 93-12, *supra*, at 17. See, H.R. Rep. No. 93-157, *supra* at 17. See, H.R. Rep. No. 93-157, *supra*, at 4-5.

Section 1113(a) of the Federal Aviation Act of 1958, prohibits states and their local subdivisions from levying and collecting head taxes or taxes on sales of transportation services by air, or the gross receipts so derived. The Court's *Aloha* decision, 464 U.S. at 12 (note 6), shows that *no new* taxing powers were granted to the states through section 1113(b):

> "[Section] 1513(a) pre-empts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. [Section] 1513(b) *clarifies* Congress' view that the States *are still* free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a)'. . . ." Emphasis added.

Subsection 1113(b) "clarifies" what taxing powers are *left* to the states after the Federal Government preempted some of those taxing powers through subsection 1113(a). The states did not acquire taxing power in the foreign commerce area in issue in this case since 1113(b) grants no new taxing powers, and the states have never had any taxing powers in this strictly foreign commerce field. *Japan Line* v. *County of Los Angeles*, 441 U.S. 452 (1979).

CONCLUSION

It is respectfully submitted that the decision of the Florida Supreme Court must be reversed.

Respectfully submitted,

WALTER D. HANSEN

BURWELL, HANSEN, MANLEY & PETERS
1762 Church Street, N.W.
Washington, D.C. 20036
(202) 745-0441

Attorney for Appellant